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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

MARK E. SCHAKEL II et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SONOMA
COUNTY,

Respondent;

GARY DEROSIER,

Real Party in Interest.

A107478

(Sonoma County
Super. Ct. No. SCV-231416)

The Court:*

Mark E. Schakel II, M.D., Kai-Uwe Mazur, M.D., and the Santa Rosa Orthopaedic Medical Group, Inc. are defendants in a suit for medical malpractice brought by plaintiff, Gary DeRosier. By this petition for writ of mandate, defendants challenge an order granting plaintiff's motion to file a second amended complaint alleging punitive damages. Defendants contend that the motion was untimely, having been filed after the first trial date in the case, and less than nine months before the second trial date. (Code Civ. Proc., § 425.13, subd. (a).)¹ In addition, defendants argue that plaintiff failed to

* Before Marchiano, P.J., Swager, J., and Margulies, J.

¹ Unless otherwise noted, further statutory references are to the Code of Civil Procedure.

establish “a substantial probability” (§ 425.13, subd. (a)) that he will prevail on his punitive damage claim, and that the superior court failed to comply with our peremptory writ of mandate in *Schakel et al. v. Superior Court* (April 13, 2004, A104314) [nonpub. opn.] (*Schakel I*).²

We agree with defendants that the motion to amend was untimely. We previously issued a stay of trial of the case, and afforded all parties notice that we might issue our peremptory writ in the first instance (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180). As no useful purpose would be served by issuance of an alternative writ, further briefing and oral argument (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240-1241), we grant the petition and order that a peremptory writ issue.

BACKGROUND

This case is before us for the second time. On April 13, 2004, we filed our opinion in *Schakel I*. In that petition, defendants challenged an earlier order of the superior court granting plaintiff’s motion to file a first amended complaint to allege a claim for punitive damages. We agreed with defendants that plaintiff’s evidence failed to demonstrate a likely entitlement to punitive damages. We issued our peremptory writ directing the superior court “to issue a new order denying without prejudice the motion to file an amended complaint and striking the filing of the first amended complaint, if such filing has occurred.” (*Schakel I, supra*, A104314 at p. 19.)

After we filed our opinion in *Schakel I*, but before the June 18, 2004 issuance of the remittitur and the peremptory writ (Cal. Rules of Court, rules 24(b), 26(a)(2), 28.2(c)(1)), plaintiff moved to file a second amended complaint raising a claim for punitive damages. The hearing was originally set for July 28, 2004. Prior to the hearing, one judge recused himself, and another was challenged pursuant to section 170.6. The matter was reassigned and rescheduled for hearing on August 10, 2004.

² We take judicial notice (Evid. Code, §§ 452, 459, subds. (d) & (a)) of the record in *Schakel I*.

As relevant here, defendants argued that the motion was untimely, having been filed after the first date set for trial and within nine months of the then pending August 30, 2004 trial date. The trial court disagreed and granted the motion to file a second amended complaint. This petition followed.

DISCUSSION

Section 425.13, subdivision (a) provides that a “court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier.” The complaint in this case was filed November 7, 2002. Trial was originally set to commence on April 16, 2004. Apparently, no courtroom was available and the matter was reset for August 30, 2004. The motion to file a second amended complaint was filed in June 2004.³ Plainly, the motion was untimely.

Although the trial court has discretion to fashion a remedy when it is not reasonably possible for a plaintiff to comply with the time limitations of section 425.13 (*Goodstein v. Superior Court* (1996) 42 Cal.App.4th 1635, 1642 (*Goodstein*)), no such circumstances are presented by this record. Plaintiff did, in fact, make a timely motion to amend to allege punitive damages, and it was that motion and resulting order that became the subject of *Schakel I*. Plaintiff’s second motion was filed after the time limits had expired.

Plaintiff argues here, as below, that because our peremptory writ of mandate directed the trial court to strike the first amended complaint and deny the motion to file an amended complaint “without prejudice,” the time limitations of section 425.13 were somehow reset. “The term ‘without prejudice,’ in its general adaptation, means that there is no decision of the controversy on its merits, and leaves the whole subject in litigation

³ The copy of the motion included in the exhibits accompanying the petition does not bear a file stamp. It was signed on June 15, 2004.

as much open to another application as if no suit had ever been brought.” (*Chambreau v. Coughlan* (1968) 263 Cal.App.2d 712, 718.) The subject “in litigation” in *Schakel I* was the question whether plaintiff’s evidentiary showing met the requirements of section 425.13. Holding that it did not, we afforded plaintiff the opportunity to make the proper showing. But we were not confronted with the questions whether a subsequent motion to amend would be timely within the meaning of section 425.13, or whether any circumstances might exist to bring the filing of a further motion to amend within possible exceptions to the time limitations of section 425.13. (*Goodstein, supra*, 42 Cal.App.4th 1635; *Looney v. Superior Court* (1993) 16 Cal.App.4th 521.) Our opinion in *Schakel I* may not be read to have resolved any of those issues. (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.)

Nor may the second amended complaint be considered a timely clarification of the allegations of the first amended complaint. As defendants correctly observe, an order striking a pleading nullifies it as though it had never been filed. (*Brown v. Ridgeway* (1983) 149 Cal.App.3d 732, 736.) Our peremptory writ issued June 18, 2004. Plaintiff’s motion was not heard until August 10, 2004. That the superior court delayed in its compliance with our peremptory writ is of no consequence since the superior court was empowered to act only in accordance with our direction. (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655.)⁴ The first amended complaint having been ordered stricken in *Schakel I*, and the earlier motion ordered denied, plaintiff’s renewed motion was untimely.

⁴ At the time of the hearing on the motion, the superior court had not yet complied with the peremptory writ in *Schakel I*, apparently because of inadvertence occasioned by the reassignment of the case. After this petition was filed, the court held a hearing on plaintiff’s motion, and on September 8, 2004, filed an order “clarifying” its record and complying with the directive of the peremptory writ. Ordinarily, we do not consider facts not existing at the time the petition was filed; however, in our discretion we elect to do so here. (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 670-671; *McCarthy v. Superior Court* (1987) 191 Cal.App.3d 1023, 1030, fn. 3.) The fact that the superior court belatedly complied with the peremptory writ does not alter our decision in this case.

CONCLUSION AND DISPOSITION

The superior court abused its discretion when it granted plaintiff's motion to file a second amended complaint to alleged punitive damages.⁵ Therefore, let a peremptory writ of mandate issue commanding respondent, Superior Court of Sonoma County, to set aside its order filed August 10, 2004, granting plaintiff Gary DeRosier's motion to file a second amended complaint, and to instead deny that motion and enter its order striking the filing of the second amended complaint.

The stay of trial previously imposed shall remain in effect until issuance of the remittitur. Petitioners shall recover their costs.

⁵ Given our conclusion, we need not and do not address defendants' other arguments.